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THE USE OF NEUTRAL WATERS BY BELLIGERENTS.

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During the past century great progress has been made in international law along two lines: (1) in the extension of the practice of international arbitration, and (2) in the development of a clearer conception of the rights and duties of neutrals. Both movements tend toward peace, the one in avoiding war by the judicial determination of the matter in dispute, and the other in limiting the area of warlike operations after war has actually been declared and in restricting hostilities to the original parties to the dispute. The Hague Peace Conference of 1899 marked the formal adoption by the nations of the earth of the principle of arbitration of certain classes of disputes, but this conference felt that its work was incomplete so long as there was such wide divergence of opinion as to the rights and duties of neutrals. Before adjournment, therefore, a resolution was passed expressing the hope that this subject might be taken under consideration by a second conference in the near future. In President Roosevelt's proposal for a second conference, issued by Secretary Hay, October 21, 1904, this is one of the three subjects suggested for consideration, and special attention is called to one aspect of it, namely, "the treatment due to refugee belligerent ships in neutral ports." This aspect of the subject derives special importance from the events of the Russo-Japanese War, and it is to this aspect of the subject that this discussion will be directed.

In the development of the law of neutrality the United States has taken the lead, and every American may well feel proud of his country's record in this matter. On this point Mr. W. E. Hall, a leading English authority, says: "The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented

by far the most advanced existing opinions as to what those obligations were; and in some points it even went further than authoritative international custom has up to the present time advanced. In the main, however, it is identical with the standard of conduct which is now adopted by the community of nations.”¹ During the Napoleonic wars we struggled hard to establish the principle that neutrals had rights which belligerents were bound to respect, and we finally went to war with England in defense of this principle. At the close of the Civil War, after long and delicate negotiation, we further established, through the Geneva award, the principle that neutral states have duties which they are bound to fulfill as well as rights to maintain.

The view now accepted is that neutrality is not a continuance of peace merely, but a peculiar status which imposes upon neutrals, whether they are willing or not, positive duties which belligerents have every right to expect them to perform. Some of these duties are well defined, while others are still matters of dispute. The idea that a state may occupy a status of qualified neutrality has been abandoned by practically all writers on international law. There are certain duties in the performance of which no neutral state is allowed any latitude. In regard to the asylum of belligerent ships in neutral waters, with which we are especially concerned in this paper, the following principles may be regarded as well recognized: (1) Neutral states are bound to prevent hostilities in their territorial waters; (2) to prevent the use of their ports and waters as a base; (3) to prevent the increase within their waters of armaments or crews; (4) to prevent the use of their waters for the purpose of watching the ships of the enemy or of obtaining information as to his future movements; (5) not to allow a belligerent ship to leave a port within 24 hours of the departure of a ship of the other belligerent.²

Many states go further than these requirements. For instance, the declarations of neutrality issued at the beginning of the Russo-Japanese War, with the single exception of the

¹ Hall's International Law, 5th edition, p. 593.

² Hall's Int. Law, 5th ed., p. 629; *cf.* also T. E. Holland in *Fortnightly Review* for May, 1905.

French, forbade belligerents to bring prizes into their ports except under stress of weather, and the French proclamation forbade their remaining in her ports with prizes more than 24 hours. The point which was most discussed during the recent war was the length of time a belligerent cruiser may remain in a neutral port. On this point the French circular was very indefinite, practically leaving the determination of the matter to the local authorities. It says: "La durée du séjour dans nos ports de belligérants, non accompagnés d'une prise, n'a été limitée par aucune disposition spéciale, mais pour être autorisés à y séjourner, ils sont tenus de se conformer aux conditions ordinaires de la neutralité."³ The rule that a belligerent ship shall not remain in a neutral port more than 24 hours was first adopted by Great Britain in 1861, and is found in the neutrality proclamations of 1904 issued by Great Britain, the United States, Egypt, China, Denmark, Norway and Sweden, Italy, and the Netherlands.⁴ Germany, Austria, and Spain did not lay down any rules in their proclamations, but merely called the attention of their subjects to the existence of war and cautioned them to observe a strict neutrality. It is believed, however, that they would have enforced the 24-hour rule had occasion arisen. In 1898 this rule was adopted by both Russia and Japan. Thus France appears to be the sole exception. While this rule has not hitherto been considered a rule of international law, its enforcement during the recent war by practically all the powers but France gave rise to the impression that the latter power had failed to do her full duty toward Japan. This impression was so strong on the part of the Japanese as to make them seriously doubt the neutral intent of France, and it may be very well questioned whether in future wars any power really wishing to maintain a neutral status will venture to disregard this rule.

The Russo-Japanese War had scarcely begun when an act was committed by Japan in the territorial waters of Korea

³ *La Justice Internationale*, Aout-Décembre, 1904, p. 139.

⁴ *Foreign Relations of the United States*, 1904, pp. 14-35; *Archives Diplomatiques*, 1904, tome 90; *Revue Générale de Droit International Public*, Mai-Juin, 1904.

which demonstrated at once the complex character of some of the questions of international law involved in this contest. On February 8, 1904, Admiral Uriu entered the harbor of Chemulpo, on the northwest coast of Korea, and began to disembark troops. There were in the harbor at the time four war vessels of neutrals and two Russian war vessels, the gunboat *Korietz* and the cruiser *Varyag*. Earlier in the day the *Korietz* had exchanged shots with the Japanese fleet off Round Island and then returned to Chemulpo. On the morning of the 9th Admiral Uriu notified the Russian commander that unless he came out before 4 p. m. he would be attacked at his anchorage. He further notified the neutral commanders of what he proposed to do and requested them to keep away from the scene of action. Upon the receipt of this information the captains of the English, French, and Italian war vessels lying in the harbor held a conference on board the English cruiser *Talbot*. The commander of the American gunboat *Vicksburg*, which was also anchored in the harbor at the time, was not notified of this conference or invited to be present, probably for the reason that in discussing beforehand with the other neutral commanders the possibility of a Japanese attack, he had expressed the intention of maintaining a strict neutrality, and had stated the opinion that the violation of Korean neutrality would be a matter entirely between Korea and the belligerents involved.⁵ As a result of the conference on board the *Talbot* the following joint communication was addressed to Admiral Uriu by the English, French, and Italian commanders:

“We consider that in accordance with the recognized rules of International Law, the port of Chemulpo being a neutral port, no country has the right to attack the vessels of another power lying in that port, and that the power which contravenes those laws is solely responsible for any loss of life or damage to property in such a port. We accordingly protest energetically against such a violation of neutrality, and we shall be happy to learn your decision on the subject.”⁶

⁵ Foreign Relations of the United States, 1904, p. 783.

⁶ Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, p. 114.

This protest was not heeded by the Japanese admiral, who stood by his ultimatum. About mid-day the Russian vessels left the harbor and were attacked by the Japanese squadron. After a fight of an hour's duration they returned in a crippled condition crowded with wounded, and the neutral war-ships, including the American, promptly lent their assistance in removing the Russian sailors from the injured vessels.

This incident raises three distinct questions: (1) Was the act of Admiral Uriu a violation of neutrality? (2) If so, did the neutral commanders have a right to protest? (3) Was the rescue of the Russian crews after the battle permissible? The first question raises the point as to the status of Korea. Was Korea in point of fact neutral territory in this war? The Emperor of Korea, it is true, issued a note to all the powers at least a month before the outbreak of hostilities declaring his determination to preserve the strictest neutrality. This declaration, as a matter of fact, however, seems to have been favorable to Russia. At least it was referred to in terms of praise by Count Lamsdorff. The point might be raised that this declaration had no force, since most publicists agree that a declaration of neutrality can be made only after war has been declared or hostilities begun. Russia denounced the act of Admiral Uriu in unmeasured terms. Japan replied that "Korea having consented to the landing of Japanese troops at Chemulpo, that harbor had already ceased to be a neutral port, at least as between the belligerents." As a matter of fact, Russia and Japan had intrigued for Korea for years without decisive result, and finally they had begun to fight for possession. The neutrality of Korea, like the independence of Korea, was largely a fiction. As Dr. Lawrence says in discussing this question, "A territory can not be neutral when war is being waged in it and for it."⁷ Korea was utterly helpless and unable to perform the neutral duties demanded of her, even if she had wished to do so. When all the circumstances are taken into account, Japan can hardly be held for a violation of neutrality in this case.

As to the protest of the English, French, and Italian com-

⁷ War and Neutrality in the Far East, p. 282.

manders, the general opinion of publicists does not sustain such action. It will be remembered that the American officer on the spot was not invited to the conference, and refrained from raising any protest, but simply prepared to take his vessel away from the scene of action. His position seems to have been correct. Violation of neutrality is a question between belligerents and the neutral whose territory is violated. Other neutrals have no concern in the matter unless their own interests are involved. In this case it has not been shown that the protesting powers had any interests at stake.

In the rescue of the crews from the injured ships the American sailors took part with the English, French, and Italian. The extent of aid that neutrals may render to belligerents after battle is one of the unsettled questions of international law. In the convention for adapting the principles of the Geneva Convention to maritime warfare drawn up by the Peace Conference of 1899, it is provided that hospital ships "shall afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents independently of their nationality" (Art. IV). It is also further provided that "Neutral merchantmen, yachts, or vessels, having, or taking on board, sick, wounded, or shipwrecked of the belligerents, cannot be captured for so doing" (Art. VI). But no provision was made for rescue by neutral ships of war. The rescue of the shipwrecked, meaning by that term, according to Captain Mahan's definition, "men overboard for any cause during or after naval battles," would seem to be no more than the dictates of humanity demand, but then the question arises as to their future status. Are they to be restored to their own country, handed over to the belligerents, or interned? While the reports of what actually took place in the harbor of Chemulpo are conflicting, still it is evident that more was done in the way of assistance than the rescue of drowning men. The Japanese made no diplomatic protest, but they did demand the surrender of the rescued Russians as prisoners of war. This the neutral commanders were unwilling to do, and, after some negotiation, the Russians were finally handed over to Russian vessels outside the area of hostilities, with the understanding

that they would not be employed again during the war. At the Hague Conference, Captain Mahan called attention to the unsatisfactory character of the rules and practice of nations on these points and suggested some positive enactments, but no agreement could be reached. This is therefore one of the problems confronting the next conference.

On the morning of August 12, 1904, before daylight, an incident occurred in Chefoo harbor which eclipsed the Chemulpo affair in the amount of discussion to which it gave rise. The Russian destroyer *Ryeshitelni*, which had escaped from Port Arthur and sought asylum in Chefoo harbor, was captured and towed out by the Japanese. As the Japanese and Russian accounts of this incident are at variance, I will give a résumé of each. The following account is taken from a Japanese official statement:

"On the night of August 10, while cruising in search of the dispersed Russian squadron, our destroyers *Asashirwo* and *Kasumi*, sighted one apparently Russian destroyer steaming in full speed westward, and immediately pursued her, but the latter disappeared in the darkness. Continuing search till next morning, they found that the enemy's destroyer had fled to Chefoo. They remained outside territorial water till night, vainly expecting her coming out. Then they entered Chefoo and found that the enemy's destroyer was the *Ryeshitelni*, and that there was no sign of her being dismantled. Accordingly Lieutenant Terashima was sent on board the *Ryeshitelni* and offered the Russian commander the alternative either to leave port before dawn or to surrender. The latter accepted neither, and while discussing proceedings ordered his men to destroy machineries and to fire. Then suddenly taking Terashima in his arms he jumped overboard. Another Russian also jumped into the sea with a Japanese interpreter. Then other Russians commenced hostilities. Meanwhile the magazine of the *Ryeshitelni* exploded, causing casualties among our men. Thereupon the *Ryeshitelni* was captured and towed out. Our casualties were 1 killed, 14 wounded."⁸

The commander of the *Ryeshitelni*, Lieutenant Rostachak-

⁸ Foreign Relations of the United States, 1904, p. 424.

ovski, reported to his government that he had lowered his flag and dismantled his vessel before the Japanese attack. His account of what then took place is as follows:

"On the night of the 11-12th I was in port, when I was piratically attacked by the Japanese, who had approached with two torpedo boats and a cruiser, and sent a party under the command of an officer as though to enter into pourparlers. Not having arms to resist, I gave orders for preparations to be made to blow up the ship. When the Japanese began to hoist their flag, I insulted the Japanese officer by striking him and throwing him into the water. I then ordered the crew to throw the enemy into the sea. Our resistance, however, was unavailing, and the Japanese took possession of the boat. Explosions occurred in the engine-room and in the forepart of the vessel, but the *Ryeshitelni* did not sink, and was taken from the port by the Japanese." ⁹

In this incident the character of Chinese neutrality was involved. The Japanese Government sustained the action of its officers on the following grounds:

"(1) That the neutrality of China, territorially speaking, is incomplete and extends only to those places which are not for the time being occupied by the armed forces of either belligerent.

"(2) That, independently of the question of the effect of the presence of the *Ryeshitelni* in the harbor upon the neutrality of China, Russia had, prior to the capture, violated the neutrality of Chefoo.

"(3) That the *Ryeshitelni* first began the struggle which resulted in her capture." ¹⁰

The second ground, which undertakes to justify the incident as an act of reprisal, cannot well be defended; while the third, in view of the very aggressive conduct of the Japanese, is hardly worthy of notice. But the first ground stated is not without a certain measure of strength, and the Japanese maintained their position with no little ingenuity. They claimed that in the struggle in which they were engaged the status of

⁹ Smith and Sibley, *op. cit.*, p. 117.

¹⁰ Foreign Relations of the United States, 1904, p. 425.

China was wholly unique; that nearly all the military operations were carried on within her borders, but that she was not a party to the conflict; nevertheless her territories were in part belligerent and in part neutral; such a condition of things was, as regards international law, an anomaly and a contradiction; but that in the interests of international intercourse and the general tranquility of China, the Japanese Government had engaged to respect the neutrality of China outside the regions actually involved in the war, provided the Russians made a similar engagement and carried it out in good faith. "In other words, the Japanese Government hold China's neutrality imperfect, applicable only to places not occupied by the armed forces of either belligerent, and that the Russians cannot escape the consequences of unsuccessful war by moving their army and navy into those portions of China which were made by the arrangement conditionally neutral."¹¹ The Japanese statement further declared that with the termination of the Chefoo incident "the neutrality of the port is revived."

The weak point in this argument is that it assumes that the entrance of the Russian vessel into the port of Chefoo seeking asylum amounted to an armed occupation of that port. The facts do not warrant this view. The *Ryeshitelni* had the same right to enter a neutral Chinese port that she had to enter any other neutral port. Under the terms of the Chinese neutrality proclamation she had a right to remain there only 24 hours. At the end of 27 hours Japan went in and cut her out. Even had the 24-hour rule, which China had voluntarily adopted, been universally recognized as a rule of international law, it was neither the right nor the duty of Japan to enforce it. A neutral state must enforce its own neutrality. It cannot suffer one of the belligerents to assume this duty. Japan's theory of conditional neutrality, a neutrality which is extinguished and revived at the will of a belligerent, is without legal basis and fails to justify her act.

The Chefoo incident raises the general question as to the right of asylum in neutral ports. As we have already had occasion to note, England adopted the 24-hour rule in 1861, and the great majority of powers have since adopted it. Rus-

¹¹ Foreign Relations of the United States, 1904, p. 139.

sia and Japan both adopted it in 1898 at the time of the Spanish-American War. France, on the other hand, has favored a less stringent policy towards belligerents. The reason of this difference is at once apparent. England's colonial possessions encircle the globe. She has naval stations in all parts of the world and does not have to depend upon neutrals for coal or provisions. The enforcement of this rule, therefore, gives her a manifest advantage over a continental power like France whose colonial interests are less extensive. Consequently France has always resolutely resisted the adoption of this rule as a rule of international law. Had she adopted it in the recent war the Baltic squadron would never have undertaken the long voyage to the East. When Russia lent her countenance to this rule in 1898 she could not have foreseen the straits to which she would be reduced in 1904.

Probably no phase of the Russo-Japanese War, as far as the naval side of it was concerned, attracted more attention or raised more perplexing questions than the long voyage of the Baltic squadron to the East. Although reliable information as to all its movements is not now available, the following facts are sufficient to illustrate the use it made of French waters. When the war broke out Admiral Wirenius was at the French port of Jibuti, Somaliland, with a battleship, several cruisers, torpedo-boats, and destroyers, and continued there for at least ten days after the declaration of war. Again, in December, 1904, Admiral Folkersahm, with the cruiser squadron of the Baltic fleet, spent a whole week at Jibuti.¹² The same port was used upon other occasions during the war very much like a base, though just what constitutes a base has never been very clearly defined in international law.

Admiral Rohzdestvensky stayed in the waters of Madagascar from December, 1904, till March, 1905. He then proceeded on his way as far as Kamranh Bay, in French Indo-China, where he remained from April 12th to 29th. He then proceeded up the coast some 50 miles to Hon-Kohe Bay. His entire stay in the waters of French Indo-China was of nearly a month's duration.¹³ The French authorities appear to have

¹² Smith and Sibley, *op. cit.*, 462.

¹³ *Ibid.*

acquiesced in the sojourns of the Russian fleet in French waters, so that it is not a question of Russia having violated French neutrality, but of France having failed in her neutral obligation to Japan. The continuation of the voyage, the ultimate destination of which was well known to be hostile, was made possible by the reception of the Russian cruisers in French waters. Theoretically, of course, France would have extended the same hospitalities to the Japanese fleet, but under the conditions as they existed it was well known that Japan would have no occasion to ask for them.

Prior to the Civil War, the use of coal by war vessels was not of sufficient importance to raise any controversy as to its contraband character. In 1862, however, Lord John Russell directed that war-ships of either belligerent should be supplied with "so much coal only as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer destination," and this rule has since been adopted by the great majority of powers. Identical language was used by England in her proclamations of neutrality issued in 1870, 1885, and 1898, but the instructions of February 10, 1904, changed the last clause so as to read, "or to some nearer named neutral destination."¹⁴ The addition of the words *named neutral* seriously restricts the coaling privileges hitherto enjoyed in British ports by belligerents. The clause seems to have been interpreted as meaning that the designated port must be on the homeward route. Thus, Great Britain refused to supply coal to the Baltic fleet, since the belligerent purpose of the voyage away from national ports was well known. The governor of Malta issued a proclamation to the effect that belligerent vessels proceeding to the seat of war were entirely

¹⁴ The King's proclamation of neutrality, issued February 11, 1904, and the letter of same date addressed to the principal departments of the government are published in the *Times* of February 12. In the Foreign Relations of the United States, 1904, p. 24, occurs an altogether erroneous and misleading statement in regard to the British letter of instructions. The statement is there made that the instructions of February 11, 1904, are the same as those issued April 23, 1898, published on page 869 of the Foreign Relations for that year. The same error occurs in the text of the British instructions published in *La Justice Internationale*, Aout-Décembre, 1904, from which the words *named neutral* are omitted. The text is correctly printed in the Archives Diplomatiques.

prohibited from coaling in British territorial waters. Similar instructions were sent to the governors of other British colonies.¹⁵ Sir John Macdonell interpreted this restriction as follows :

“Thus, a Russian vessel of war arriving at Malta from Kronstadt might demand coal to take her home, but she would probably be refused coal sufficient to take her to Port Arthur. Of course this restriction might be evaded by coaling repeatedly first at the port of one state and then at that of another. But a neutral state which winked at such evasions of a tolerably well recognized rule would justly be held blamable by any international court. Nor may the belligerent cruiser receive a fresh supply in a British port until after three months, unless in special circumstances.”¹⁶

France, as we have seen, takes a very different view. She does not regard coal as contraband of war, and she allows belligerents extensive rights as to the use of her ports and waters. As a recent French writer expresses it :

“France throws her ports wide open to belligerent war-ships; she does not limit the length of their stay; she only limits it to 24 hours when they have entered the port with prizes taken from the enemy. War-ships which sought refuge in a neutral port to escape the enemy’s pursuit are free to stay or leave. If the enemy wishes to reduce them to a state of impotence, it is for him to take the necessary measures to make it dangerous for them to leave.”¹⁷

While the questions raised during the Russo-Japanese War seem to have increased rather than simplified the complexities of the law of maritime neutrality, there is one rule of very recent origin and very radical in character which seems to have been adopted by well nigh all the powers. This is the rule that belligerent ships taking refuge in neutral ports after defeat must be dismantled and their crews interned until the close of the war. This practice is either not alluded to, or, when alluded to, condemned by most of the text writers.

¹⁵ Smith and Sibley, *op. cit.*, p. 135; *cf.* also Hannis Taylor in the *N. Am. Rev.*, Aug., 1905, and T. E. Holland in the *Fortnightly Review* for May, 1905.

¹⁶ *Nineteenth Century*, March, 1904.

¹⁷ Charles Dupuis in *North American Review*, Aug., 1905.

Even so recent and weighty an authority as Mr. W. E. Hall, in the last edition of his book, states expressly that a belligerent ship is not liable to be disarmed on taking refuge after defeat. "To disable a vessel, or to render her permanently immovable, is to assist her enemy." He adds, however, that "a tendency towards the enforcement of a harsher rule becomes more defined with each successive war."¹⁸

The first case of dismantling was, apparently, that of the Russian gunboat *Mandjur*, which arrived at Shanghai February 15, 1904, and remained there in spite of Japanese protests for several weeks. Finally, about March 31 the boat was disarmed and parts of her machinery removed. After the great naval fight of August 10, 1904, in which Admiral Togo defeated and dispersed the squadron from Port Arthur, the destroyer *Groszovoi* and the cruiser *Askold* took refuge in Shanghai, the *Diana* at Saigon (French), and the flagship *Tsarevitch* and three torpedo-boats in Kiao-Chau (German). After negotiations, in which the Japanese authorities demanded disarmament and the Russians protested against it, agreements were finally reached, in accordance with which these ships were all dismantled and their crews interned at specified places until the close of the war.¹⁹

Upon two occasions during the Russo-Japanese War the United States had to face this question, and in both cases the outcome was internment. The first case was that of the *Lena*, a Russian auxiliary cruiser, which arrived at San Francisco September 11, 1904, with a crew of 500 men and an armament of 27 quick-firing guns, thirty-one days out from Vladivostok. There was some excitement and speculation as to the cause of her visit. Her captain announced that her engines and boilers were in need of repairs and asked permission to dock at San Francisco. By order of the President a thorough examination was made of the vessel, which showed that she was unseaworthy and needed a thorough overhauling. Four days after her arrival the President directed that the *Lena* be taken in custody by the naval authorities of the United States

¹⁸ Hall, *International Law*, 5th ed., p. 627.

¹⁹ *Foreign Relations of the United States*, 1904, pp. 136, 138, 140, 323, 426; Smith and Sibley, *op. cit.*, p. 136.

and disarmed. The vessel was taken to Mare Island Navy-Yard and there disarmed by the removal of small guns, breech-blocks of large guns, small arms, ammunition and ordnance stores, and the captain gave a written guaranty that the *Lena* would not leave San Francisco until the close of the war. The officers and crew were paroled not to leave the United States until the conclusion of hostilities or until some other agreement might be reached as to their disposal between the Government of the United States and both belligerents.²⁰

The other case was that of the three vessels of Admiral Enquist's squadron, the *Oleg*, the *Aurora*, and the *Jemchug*, which entered the harbor of Manila on June 3, 1905, in a terribly battered condition, having escaped from Admiral Togo's pursuit. The Russian admiral at once requested Governor Wright and Rear-Admiral Train for permission to remain and repair. After consultation with the President, Secretary Taft cabled to Governor Wright that "time cannot be given for the repair of the injuries received in battle. Therefore, the vessels cannot be repaired unless interned until the end of hostilities." The Russian Admiral gave his parole and the vessels were disarmed and interned.²¹

The prompt action of the United States in these cases attracted wide attention and was decisive in establishing this rule. No feature of the war is of more importance from the standpoint of international law. Should the rule of internment applied by the United States continue to be enforced in future wars, as there seems every likelihood that it will be, it will tend to limit greatly the area and duration of maritime contests. In fact, some publicists go so far as to favor the absolute exclusion of belligerent vessels from neutral waters under all circumstances, under penalty of internment. Such a rule would effect a revolution in the naval situation and would be the greatest step that could be taken towards universal peace. While it is hardly probable that it will be adopted in the near future, nevertheless, as I have already remarked, the tendency is in this direction, for in each successive war the lines of neutrality are drawn tighter.

²⁰ Foreign Relations of the United States, 1904, pp. 428 and 785.

²¹ Review of Reviews, July, 1905, p. 5.